Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services	)	WT Docket No. 02-381
	)	
2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services	)	WT Docket No. 01-14
	)	
Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services and to Facilities Capital Formation	)	WT Docket No. 03-202

SPRINT REPLY COMMENTS

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Summary

Sprint addresses three issues in these reply comments.

1. There is no basis in law or policy to change existing license renewal rules, particularly for carriers that obtained their licenses at auction.

- As the FCC acknowledges, its market-based entry policy has been a "huge success," and there is no reason to believe that continued adherence to this policy will not continue to be successful in the future – in urban and rural areas alike. This is especially the case with the new Secondary Markets/leasing rules that will likely open entirely new opportunities for firms interested in serving rural areas using wireless technologies.
- That rural areas typically have fewer competitors than urban areas is not indicative of market failure, licensee indifference, or a failure of the FCC's market-oriented policies – but rather is reflective of economic factors. Moreover, the fewer number of providers in rural areas does not mean that customers in those areas are not benefiting from the competitive wireless marketplace.
- The universal service fund program represents the most economically efficient mechanism for facilitating additional carrier entry in high cost rural areas where entry cannot otherwise be justified by economic and market forces.
- Adoption of renewal term buildout requirements can only interfere with the natural functioning of the market and will result in uneconomic investment in areas where additional entry is not economic or otherwise justified by market demand, and these uneconomic costs would be passed on to the entire customer base, and could impact the viability of carrier operations if mandated.
- The FCC should reject suggestions of rural cellular incumbents who seek either to impose rural area buildout requirements on PCS licensees or to convert PCS licenses into the "use it by date certain or lose it" model. These discriminatory suggestions effectively seek to prevent PCS licensees from becoming actual competitors to incumbent services.
- Modifying PCS license renewal terms cannot be justified under the relevant statutory standard. Further, such a modification would disrupt licensee/investor confidence in future auctions, as bidders would lack certainty regarding the FCC's long-term commitment to honoring the material terms of license contracts.
- Modification of the PCS license renewal rules could expose the federal government to significant damages liability. The auction of PCS licenses establishes a contract between the federal government and the licensee. By changing the essential terms of the license, in the form of post-renewal buildout requirements, the FCC would be committing a breach of its contractual duty to deliver a license that accords with the terms and conditions of the auction. Under these circumstances, the FCC would be subject to the same contractual remedies that would be applicable if a substantial breach occurred in a contract between private parties, including damages liability.

Such action also may qualify as a "regulatory taking" to the extent the action interferes with PCS licensees' investment-backed expectations.

2. The FCC should adopt its proposal to add a "substantial service" performance standard alternative for all wireless services licensed on a geographic basis, including PCS and MDS/ITFS licenses. Such action would promote the regulatory parity directive of the Communications Act. The FCC should reject the appeals of those rural cellular incumbents that seek to replace the substantial service performance requirement with a "stricter" population- or geographic-based requirement. This position is illogical and anti-competitive, and seeks only to impose requirements that their strongest potential competitors (*i.e.*, existing PCS licensees) may not be able to meet given the economics of serving rural areas.

3. It is premature to consider use of the regulatory easement model in any area, rural or otherwise. As the Spectrum Task Force has recognized, the unproven easement model should not be considered until after the effectiveness of the market-orientated, secondary markets model has been evaluated. In any event, the easement model seems wholly inappropriate for rural areas because demand for spectrum in low-density areas is considerably less than demand in suburban or urban areas. The principal challenge faced by rural carriers is not access to spectrum, but access to financing to make additional investments.

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SPRINT REPLY COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions ("Sprint"), submits these reply comments in connection with the Notice of Proposed Rulemaking and the comments filed in response.[1]

I. THERE IS NO BASIS IN LAW OR POLICY TO CHANGE EXISTING LICENSE RENEWAL RULES

The Commission proposes to adopt a "substantial service" construction benchmark alternative for all wireless services, including PCS licenses, during the initial license term so as to increase licensee flexibility in meeting customer demands.[2] The Commission then asks whether

[1] *See Facilitating the Provision of Spectrum-Based Services to Rural Areas,* WT Docket Nos. 02-381, 01-14 and 03-202, *Notice of Proposed Rulemaking,* FCC 03-222, 18 FCC Rcd 20802 (Oct. 6, 2002), *summarized in* 68 Fed. Reg. 64050 (Nov. 12, 2003)("*Rural Spectrum NPRM*").

[2] *See Rural Spectrum NPRM* at ¶ 35.

it should adopt more rigorous performance requirements during renewal license terms, even though current license renewal rules impose no such additional requirements.[3] As discussed below, there is no basis in law or policy to change existing license renewal rules – especially for carriers that obtained their licenses at auction.

A. THE COMMISSION HAS ACKNOWLEDGED THAT ITS MARKET-BASED ENTRY POLICY HAS BEEN A "HUGE SUCCESS"

Sprint agrees with the Commission that market forces should be allowed to operate without the imposition of regulatory restrictions or requirements.[4] The Commission has consistently followed "a market-oriented approach to spectrum policy that, where possible, has allowed economic forces to determine build-out of wireless facilities and the provision of wireless services."[5] The Commission adopted this policy because it "allows firms to operate at a competitive and efficient scale of operation" that, in turn, benefits consumers:

> The providers are then able to pass along to consumers the cost savings from efficient operations.[6]

Although the Commission has concluded that its market-based entry policy has been "a huge success," it nevertheless asks at the behest of certain rural carriers whether new, "additional" buildout requirements during a renewal term will "increase the provision of wireless services to rural areas."[7]

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[3] *See id.* at ¶¶ 44-46.

[4] *See Rural Spectrum NPRM* at ¶ 45.

[5] *Id.* at ¶ 34.

[6] *Id.* at ¶ 6.

[7] *Id.* at ¶¶ 3 and 44.

There is good reason for the Commission to be "inclined" to continue to "allow market forces to operate without the imposition of regulatory restrictions or requirements."[8] Without question, the Commission's policy of relying on market forces to govern entry decisions has been "a huge success." As the Commission's own data documents, 95 percent of Americans live in counties with three or more different operators, with 83 percent of Americans having the choice of five or more providers.[9] In addition, 97 percent of Americans live in counties where operators offer second generation digital services, and 93 percent of Americans have access to new third generation technologies.[10] The recent *Eighth CMRS Competition Report* documents how all customers are benefiting from this competition in the form of lower prices, more minutes and an ever increasing array of new options and capabilities (*e.g.*, picture phones, broadband and mobile Internet access).

Admittedly, there are fewer wireless competitors in rural areas than in urban areas – just as there are fewer landline operators in rural areas. According to the Commission's most recent data, on average, "rural markets have slightly more than three [wireless] providers, while urban markets have been five and six providers."[11] The Commission asks in the *NPRM* whether the fewer number of competitors in rural areas is due to a market failure.[12]

There is no evidence that the fewer number of wireless carriers in rural areas is due to a market failure. To the contrary, the different number of carriers in rural and urban areas is due to

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[8] *Id.* at ¶ 45.

[9] *See id., citing Eighth CMRS Competition Report,* 18 FCC Rcd 14783, 14793-94 ¶ 18 (2003).

[10] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14794 ¶ 18 and 14821-22 ¶ 78. Given this data, there is no basis to the unsupported assertion that "wireless had been primarily an urban and suburban service." Blooston Comments at 4.

[11] *Id.* at 14836 ¶ 116.

[12] *See Rural Spectrum NPRM* at ¶ 7.

the basic laws of economics. As the Commission has already recognized, "the underlying economics appear to make it unlikely that competition in RSAs will evolve in the near term to rival that in MSAs [Metropolitan Statistical Areas]":

> Specifically, the cost of building out a network with pervasive coverage is likely to be higher in rural than in urban areas (especially for digital networks on 1.9 GHz PCS spectrum with lower power handsets), and revenue potential is lower. Thus, the potential revenue from initiating or expanding service in an RSA may not be sufficient to cover the costs of building out the network, including any opportunity costs associated with directing resources to rural buildout instead of enhancing the carrier's network in urban areas.[13]

The record evidence supports these Commission observations. For example, Western Wireless has documented that the cost of providing wireless service in rural areas is significantly higher than in more densely populated areas.[14] As one group of rural carriers observes, that there are a fewer competitors in rural areas simply indicates that "the market is functioning as it should, resulting in the economically efficient number of carriers providing service in a given rural area, based upon the area's own unique operating profile."[15]

This principle can be demonstrated as a simple issue of mathematics. Using one of the proposed definitions of rural areas (those with a population of 100 or fewer persons per square mile), assuming a cost of building a rural cell site at approximately $450,000 with a coverage of 60 square miles, and using assumed revenue of $50 monthly per customer, it would take the car-

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[13] *2000 Biennial Review - Spectrum Cap Order*, 16 FCC Rcd 22668, 22691 ¶ 43 (2001). *See 1998 Biennial Review – Spectrum Cap Order*, 15 FCC Rcd 9219, 9256 ¶ 84 (1999)("[T]he economics of serving high-cost and low-density areas makes it unreasonable to expect a large number of independent carriers to be viable."); *Minnesota PCS Order*, 17 FCC Rcd 16371, 16373 ¶ 7 (2002)("[R]ural markets are, as expected, more likely to be underserved by virtue of their sparse population than more urban areas."); *Rural Spectrum NPRM* at ¶ 104 ("[B]ecause of the lower population density and small customer base found in rural areas, the economically efficient number of providers for these markets will be fewer than that for urban markets. With fewer customers over which to spread their costs, there will be fewer providers."); *id.* at ¶ 7 ("[B]ecause of economies of scale in wireless networks and lower population densities in rural areas, the economically efficiently number of providers will be fewer.").

[14] *See* Western Wireless NOI Comments at 13-17.

rier seven years to recoup its investment in this cell site – *if* it gains a market share of 25 percent. Of course, the payback period would be even longer if the carrier serves a smaller share of the market. Unfunded government mandates that have the effect of imposing uneconomic investments could impact the very viability of a service provider and its continued operations.

Importantly, the fewer number of providers in rural areas does not mean that customers in rural areas are not enjoying the benefits of competition. The Commission has noted that the prices charged by rural wireless carriers are constrained by the prices charged by larger carriers in overlapping and adjacent markets, and available studies confirm that average prices for service in rural areas are "very similar" to average prices for wireless service in urban areas.[16] Additionally, the Commission determined recently that wireless carriers "are competing effectively in [rural] areas" even with fewer competitors:

> [D]ata and statements presented by Public Forum participants and NOI commenters provide evidence that, despite the differing structure of rural markets, effective CMRS competition does exist in rural areas.[17]

Indeed, prices for wireless service in rural areas have dropped to such a significant extent that rural wireless carriers are beginning to compete against heavily subsidized rural incumbent LECs.[18] In this regard, some rural LECs have reported decreases in their number of access lines as a result of competition from wireless services.[19]

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[15] OPASTCO and RTG Joint Comments at 13.

[16] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14837 ¶ 118.

[17] *Eighth CMRS Competition Report,* 18 FCC Rcd at 14791-92 ¶ 13 and 14837-38 ¶ 120.

[18] *See id.* It bears remembering that less than nine years ago, the FCC stated that it was only "conjecture" whether any wireless service "can eventually compete" with LEC services. *See First CMRS Competition Report,* 10 FCC Rcd 8844, 8869 ¶ 75 (1995).

[19] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14837 ¶ 119.

The Commission's market-based entry policy has been a "huge success" in the past, and there is no reason to believe that maintenance of this policy will not continue to be successful in the future. After all, as the Commission has acknowledged, this market-based policy results in lower prices to customers because carriers are able to operate efficiently based on market considerations. And, efforts like Sprint PCS' affiliates program and the Commission's new secondary markets/leasing initiative offer yet additional market-based entry opportunities for firms interested in serving rural areas.

B. THE ADOPTION OF ADDITIONAL BUILDOUT REQUIREMENTS DURING RENEWAL TERMS NECESSARILY WILL RESULT IN UNECONOMIC INVESTMENT

The Commission asks whether the imposition of additional performance requirements during renewal terms will "likely result in uneconomic construction?"[20] In fact, uneconomic investment will be the inevitable result of any renewal term buildout requirements that the Commission might adopt.

Under the Commission's current market-based entry policy, licensees enter new geographic areas, including rural areas, when market forces and economics warrant. As noted above, this policy has already enjoyed considerable success. Rural markets today average slightly more than three wireless carriers, where there were only one or two cellular incumbents a decade ago.[21] Additionally, prices for wireless services in rural areas have fallen so dramatically that wireless carriers are beginning to compete with rural incumbent LECs.[22]

Market forces will continue to drive carriers to enter rural markets when customers demand additional coverage and when there is a reasonable prospect that the new entrant can re-

[20] *See Rural Spectrum NPRM* at ¶ 45.

[21] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14836 ¶ 116.

[22] *See id.* at 14791-92 ¶ 13.

cover its costs.[23] Thus, any new entry requirements that the Commission may impose necessarily will have consequence ***only*** in those areas where additional entry is *not* economic or *not* otherwise justified by market demand.

The Commission has observed that customers are the beneficiaries of its current market-based entry policy because carriers can operate efficiently and then "pass along to consumers the cost savings from efficient operations."[24] In stark contrast, customers will be penalized in the form of higher prices if carriers are forced by regulation to make uneconomic investments as a condition to retaining their licenses.

It is important for the Commission to realize that forcing one or more carriers to make uneconomic investments negatively impacts the entire market in an area – both service providers and customers. As the National Telecommunications Cooperative Association ("NTCA") has recognized, "[p]ushing competition into an area that cannot support multiple providers causes all providers and their subscribers to suffer":

> If [government] policies are designed to introduce four or five providers of a competing service into an area that can support no more than one or two, there is the substantial risk that all will fail. As the companies struggle for their survival, the customer loses as none of the companies can afford to upgrade service or equipment.[25]

Sprint submits that a Commission decision to force carriers operating in a competitive market to make uneconomic investments would undermine the public interest and should not be entertained. Carriers have a strong economic incentive to enter underserved areas (including ru-

[23] It is important to remember that coverage in rural areas is dictated not simply by the residents of rural areas, but also by residents of suburban/urban areas who travel to or through rural areas. Also, incumbent rural cellular carriers play an important role in determining whether additional entry will occur. For example, there is less incentive for other carriers to enter rural markets if the rural cellular incumbents charge reasonable prices for roaming services.

[24] *See Rural Spectrum NPRM* at ¶ 6.

[25] NTCA Comments at 4.

ral areas) where market forces dictate, and new government mandates that would force uneconomic entry could have the unintended effect of negatively impacting a service provider's continued viability.

C. THE SOLUTION FOR ADDITIONAL ENTRY IN HIGH COST AREAS IS UNIVERSAL SERVICE SUBSIDIES

All parties agree that rural areas are more expensive to serve than urban/suburban markets because of lower population densities, terrain, *etc*.[26] This basic economic fact applies whether a service provider uses landline or wireless technology. Rural incumbent LECs are able to provide service in high cost areas charging the prices they do largely because they receive such sizable universal service subsidies, with NTCA stating that, on average, its members receive 30 percent of their total revenues from such subsidies.[27]

Congress specified in the 1996 Act that customers in rural areas should have access to telecommunications services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in rural areas."[28] Congress further made clear in establishing the eligible telecommunications carrier provisions ("ETC") that it expected rural consumers should enjoy the benefits of competitive choice and that competitive carriers would be eligible to receive universal service subsidies.[29]

The Commission in its *Rural Services Notice of Inquiry* asked whether its universal service fund ("USF") programs were important in promoting deployment of wireless service to ru-

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[26] *See, e.g.,* OPASTCO/RTG Joint Comments at 8.

[27] *See* NTCA, *A Report on Intercarrier Compensation: The Landscape for Rural Incumbent Local Exchange Carriers and the Impact of Central Office Bill and Keep (COBAK*), at 28 (Jan. 13, 2004).

[28] 47 U.S.C. § 254(b)(3).

[29] *See* 47 U.S.C. § 214(e).

ral areas.[30] In response, the NOI commenters identified universal service subsidies as the single most important factor in promoting the availability of competitive wireless services in high cost rural areas.[31]

Policymakers have three choices when market forces on their own are deemed to be slow in producing a desired result (*i.e.*, competition): leave the market forces alone and wait; enact a regulatory policy that displaces the market forces; or enact policy that works alongside the market forces. In terms of economic efficiency, if the first alternative is not deemed acceptable, then the third alternative becomes the optimal solution. Ensuring that wireless carriers are capable of receiving the same USF subsidy that incumbent LECs already enjoy (and require) is a policy that works with the market forces, by encouraging – but not mandating – entry and by ensuring that uneconomic entry (and the inefficiencies that go with it) are avoided.

The Commission in its *Rural Services NPRM* acknowledged the importance of USF subsidies in "promoting the availability of rural service," but decided to address rural universal service issues "in separate proceedings."[32] The Commission is, of course, free to address issues in the manner it deems most efficient. But the Commission should at least acknowledge in its order in this proceeding that access to USF subsidies is the single most important step to encourage competition in areas where service would be otherwise uneconomical. As one rural wireless carrier observes:

> It is unreasonable to expect that any carrier will extend service into an area in which costs make that service uneconomic. The *only* regulatory initiative that

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[30] *See Rural Spectrum NOI*, 17 FCC Rcd 25554, 25570 ¶ 30 (2002).

[31] *See, e.g.*, CTIA NOI Comments at 3-5; Dobson NOI Comments at 16-18; Monet NOI Comments at 8-9; Smith Bagley NOI Comments at 5-9; Western Wireless NOI Comments at 17-22.

[32] *See Rural Services NPRM* at 5 n.17.

> could overcome this basic market dynamic and create an incentive for carriers to serve uneconomic areas is a universal service subsidy.[33]

And, as the Commission has already recognized, it is "unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price."[34]

D. SOME RURAL CARRIERS WANT THE COMMISSION TO FORCE THEIR POTENTIAL COMPETITORS EITHER TO MAKE UNECONOMIC INVESTMENTS OR FORFEIT THEIR LICENSES

Many rural areas are served by smaller cellular carriers that have provided their wireless services for over a decade, and many of these cellular incumbents are affiliated with incumbent rural LECs.[35] The most likely potential competitors to these cellular incumbents are PCS licensees. Rural cellular incumbents now urge the Commission to adopt policies that would have the effect of preventing PCS licensees from ever becoming actual competitors to their incumbent services.

The Commission has asked whether additional buildout requirements should be imposed on PCS licenses during the renewal term as a means to "increase the provision of wireless services to rural areas."[36] The majority of commenters, including most rural carriers, oppose any post-renewal buildout requirements.[37]

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[33] Dobson Comments at 7-8 (emphasis added). *See also* CTIA Comments at 7 ("To the extent there are rural areas that are not economically viable to serve under these circumstances, the appropriate solution is to ensure carrier serving those areas receive adequate USF support to enable them to provide high quality, competitive offerings to consumers resident in those areas.").

[34] *Western Wireless Kansas Preemption Order*, 15 FCC Rcd 16337, 16231 ¶ 8 (2000).

[35] Indeed, under the FCC's cellular licensing rules, incumbent LECs were guaranteed obtaining one of the two cellular licenses. *See, e.g.,* OPASTCO/RTG Joint Comments at 8.

[36] *Rural Spectrum NPRM* at ¶ 44.

[37] *See, e.g.,* AT&T Wireless Comments at 6-9; CTIA Comments at 6-7; Rural Cellular Association Comments at 9 ("Performance requirements should be unnecessary in the competitive wireless industry where service quality is mandated by customers."); Southern LINC Comments at 8-10.

Only one rural commenter suggests that post renewal buildout requirements "*may* be appropriate."[38] But recognizing that buildout requirements in rural areas present "thorny problems" and can actually discourage investment in rural areas, this commenter suggests that renewal term buildout requirements be imposed only on larger carriers, with smaller carriers subject to no buildout requirements during the renewal term.[39]

This discriminatory proposal – impose additional buildout requirements only on certain carriers based on their size or the size of their licenses – is at complete odds with the Congressional regulatory parity directive for wireless services.[40] This proposal is also irrational. As even this commenter concedes, the pace of system buildout, including in rural areas, is dictated by "economic forces."[41] The size of carrier or its license has nothing to do with the issue of whether additional entry in a particular rural area can be economically justified. If anything, given the sizable economies of scale in the telecommunications industry, a larger carrier can often serve a rural area more economically than can a small carrier, and it has all incentives to proceed, where appropriate.

Other rural carriers, recognizing that this discriminatory additional buildout proposal cannot be justified in law or economics, instead urge the Commission to achieve the same result by converting PCS licenses from geographic licenses into the cellular "keep what you use" model. For example, the Rural Cellular Association states:

> Unserved PCS areas, usually rural, can remain licensed but unserved. The unserved area licensing process should be extended to PCS and other radio services

[38] Blooston Comments at 18 (emphasis added).

[39] *Id.* at 17-18.

[40] *See* page 21 *infra.*

[41] Blooston Comments at 10.

> to allow entities willing to use spectrum to apply and obtain licenses for unserved areas.[42]

Rural cellular incumbents make this "convert PCS into 'use it/lose it' licenses" even though they say that many of their rural service areas are incapable of supporting more than two wireless carriers.[43] In other words, rural cellular incumbents want the Commission to adopt a regime whereby their most likely potential competitors are forced to make the Hobson's choice of making uneconomic investments or forfeiting their licenses in rural areas (even though entry may be justified in the future).

Rural cellular incumbents justify their "convert PCS into 'use it/lose it' licenses" position by asserting that PCS licenses are "[d]riven solely by profit" and that large PCS licensees in particular "lack the motivation to serve rural communities."[44] Such an argument is at best disingenuous. All wireless carriers, including small and rural carriers, are driven by profit, as the cellular incumbents elsewhere acknowledge.[45]

There is also no basis to the rural cellular incumbent argument that large PCS licensees "lack the motivation to serve" rural areas. These rural incumbents acknowledge that the Commission's rigorous buildout rules for PCS MTA licenses effectively required licensees to focus

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[42] Rural Cellular Association Comments at 5. *See also* NTCA Comments at 9-10; OPASTCO/RTG Joint Comments at 4-6.

[43] *See* OPASTCO/RTG Comments at 13 (FCC has "misconception that competition by more than two carriers in many rural markets may be realistically accomplished. . . . Many rural and remote areas . . . may not be able to generate enough revenue to naturally sustain as many wireless service providers as more lucrative urban markets."); NTCA Comments at 4 ("If policies are designed to introduce four or five providers of a competing service into an area that can support no more than one or two, there is a substantial risk that all will fail.").

[44] NTCA Comments at 4 and 7.

[45] *See, e.g.*, NTCA Comments at 3 (Rural carriers are motivated "by the bottom line.").

their initial construction in the more populous urban/suburban areas.[46] Having made this investment, PCS licensees have no choice but to direct a sizable portion of their current capital budget to increasing capacity in these coverage areas so as to maintain service quality as customer demand and usage develops. But as evidenced by the growing number of interconnection disputes between rural LECs and wireless carriers, larger PCS licensees are now beginning to expand their networks to more rural areas given customer demand for wireless services while traveling.

Some rural commenters further assert that PCS licensees are warehousing their spectrum in rural areas and that PCS spectrum in rural areas is "wasted."[47] But as the Commission has noted, it can be "a prudent business decision . . . for firms to hold spectrum in anticipation of future needs."[48] Indeed, as one federal court has noted, the rural incumbent 'warehousing' argument is "a foolish notion that should not be entertained by anyone who has had even a single undergraduate course in economics":

> [A] rational licensee will voluntarily put its spectrum into service only when the additional revenue it expects to earn from doing so exceeds the additional cost it must incur to do so.[49]

Besides, it is simply inaccurate to assert that unused licensed spectrum in rural areas is "wasted," given the role that potential competitive entry plays in moderating the conduct of the rural cellular incumbents.

Nor is there any policy reason to convert PCS licenses into "use it/lose it" licenses. Access to spectrum in rural areas, the Commission has recognized, does "not appear to be a sub-

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[46] *See, e.g.,* NTCA Comments at 7 ("[L]arge carriers and smaller carriers without ties to rural communities understandably concentrate their build out efforts on the more profitable urban areas.").

[47] *See* Rural Cellular Association Comments at 3; OPASTCO/ RTG Joint Comments at 6.

[48] *Spectrum Cap Order,* 16 FCC Rcd 22668, 22692 n.148 (2001).

[49] *Fresno Mobile Radio* v. *FCC,* 165 F.3d 965, 969 (D.C. Cir. 1999).

stantial barrier to entry in RSAs [Rural Service Areas]."[50] Firms interested in entering rural markets have been successful in obtaining their own spectrum, either directly in an auction or indirectly *via* partitioning/disaggregation.[51] And, as even rural interests acknowledge, the new spectrum leasing rules will provide yet another meaningful opportunity to obtain spectrum.[52]

It is important to remember that PCS carriers face unique challenges in entering rural markets. The propagation characteristics of the PCS band are not as suitable as the cellular band in serving rural areas, and PCS carriers use lower powered handsets.[53] Also, they enter a sparsely populated area with zero market share and must compete against incumbents that have often been providing service for a decade or longer.

It is perhaps understandable that rural cellular incumbents would ask the government to prevent their potential competitors from becoming actual competitors. But a government policy or agency rule that precludes potential competitors from becoming actual competitors cannot, under any circumstance, be deemed to be consistent with the public interest.

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[50] *Spectrum Cap Order,* 16 FCC Rcd 22668, 22691 ¶ 43 (2001). In this regard, the FCC has observed because there is so much unused spectrum in rural areas, "the opportunity costs of rural spectrum rights is likely near zero." *1998 Biennial Review – Spectrum Cap Order*, 15 FCC Rcd 9219, 9256 ¶ 84 (1999).

[51] *See Rural Spectrum NPRM* at ¶ 3.

[52] *See, e.g.*, Blooston Comments at 10-11. As the FCC correctly acknowledges, there has been "little time to evaluate the effectiveness of [the new secondary markets] approach." *Rural Spectrum NPRM*. at ¶ 30.

[53] *See, e.g., 2000 Biennial Review - Spectrum Cap Order,* 16 FCC Rcd 22668, 22691 ¶ 43 (2001). *See 1998 Biennial Review – Spectrum Cap Order,* 15 FCC Rcd 9219, 9256 ¶ 84 (1999).

E. THERE IS NO BASIS IN LAW OR POLICY TO CHANGE EXISTING LICENSE RENEWAL RULES

Under current rules, PCS licensees are entitled to renew their licenses upon demonstration that they provide "substantial service."[54] Also under current rules, no new buildout requirements are imposed during the renewal term.[55] Thus, the rural cellular incumbents advocating that the Commission impose new requirements during PCS renewal terms (whether new buildout requirements or converting PCS licenses into "keep what you use" licenses) are asking the Commission to modify the terms of PCS licenses.

The Communications Act empowers the Commission to modify the term of licenses under certain circumstances.[56] To exercise this statutory authority, the Commission must, among other things, determine that the proposed modification "*will* promote the public interest, convenience, and necessity."[57] Congress has further made clear that the burden of demonstrating that a license modification "will promote" the public interest "shall be upon the Commission."[58]

Sprint submits that a modification of the PCS license renewal rules cannot be justified under this statutory standard. First, the Commission has already concluded that there exists effective competition in rural areas.[59] Second, the modifications that rural cellular incumbents advocate would have the practical effect of forcing entry in high cost areas where investments

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[54] *See* 47 U.S.C. § 24.16. *See also Rural Spectrum NPRM* at ¶ 16 ("[O]nce these [performance] benchmarks are achieved, licensees are generally afforded exclusive rights and a renewal expectancy for the entire area and band of the license regardless of whether service is being provided in all parts of the area or over all of the spectrum.").

[55] *See Rural Spectrum NPRM* at ¶ 43 ("Once a licensee renews its licensee, however, no additional performance requirements are imposed in subsequent terms.").

[56] *See* 47 U.S.C. § 316.

[57] *Id.* at § 316(a)(1)(emphasis added).

[58] *See id.* at § 316(b).

[59] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14791-92 ¶ 13 and 14837-38 ¶ 120.

could not otherwise be economically justified. A government order forcing private firms to make uneconomic investments, where the public benefits from such investments would be marginal at best because effective competition already exists, cannot credibly be considered consistent with the public interest.

There is an additional reason why the retroactive modification of PCS license renewal rules would be incompatible with the public interest.[60] The auction process for radio licenses has been successful in large part because licensees and their investors have had confidence in understanding with precision what they are buying. Investor confidence in future auctions would be destroyed if the Commission announces, years after an auction has occurred, that the material terms of the license contract will be changed. In this regard, the Commission has recognized that one of its foremost objectives is to "preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules."[61]

> Maintaining the integrity of our rules and auction processes is an essential goal. . . . We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.[62]

Sprint submits that a Commission order changing the material terms of licenses obtained at auction would destroy investor confidence in future auctions.

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[60] Sprint focuses these comments on the FCC's authority to adopt post-renewal buildout requirements for licenses that have been auctioned.

[61] *PCS Installment Payment Reconsideration Order*, 13 FCC Rcd 8345, 8348 ¶ 7 (1998).

[62] *Second PCS Payment Plan Order*, 12 FCC Rcd 16435, 16437 ¶ 3 (1997).

F. THE RURAL CARRIER POSITION COULD EXPOSE THE FEDERAL GOVERNMENT TO SIGNIFICANT DAMAGES LIABILITY

The rural carrier position is problematic assuming *arguendo* that the Commission could justify a retroactive change in the PCS license renewal rules under the Communications Act public interest standard, because such a modification could expose the federal government to significant damages liability.

The Commission and the courts have repeatedly recognized that an auction of PCS licenses establishes a contract between the federal government and the licensee, under which both parties owe duties to each other.[63] PCS carriers paid the U.S. Treasury sizable consideration for their licenses – in Sprint's case, over $3 billion – and they invested additional billions in relocating incumbent licensees in the PCS band and in constructing networks to meet the buildout requirements of their licenses. The auction winners paid such amounts for licenses that were defined by FCC rules and orders in existence *prior to the auction,* subject to standardized terms and

[63] *See BDPCS*, 15 FCC Rcd 17590, 17599-600 (2000)("The announcement of the winning bidder in an auction conducted by the Commission [is] like the acceptance of high bids in auctions in other settings . . . ."); *Installment Payment Financing Second Reconsideration Order,* 14 FCC Rcd 6571, 6581 n.66 (1999)(FCC auction rules create a binding mutual obligation between the Commission and the winning bidder as of the close of the auction. At the time the Commission accepts the winning bid in its public notice closing the auction, the Commission becomes bound to issue a license to the winning bidder if it is determined to be qualified as a licensee pursuant to the Commission's rules and procedures, and concomitantly, the winning bidder becomes contractually bound at the close of the auction to pay the full winning bid."); *see also Nextwave Personal Communications v. FCC,* 200 F.3d 43, 45 (2d Cir. 1999) ("The close of the auction established the FCC's obligation to grant NextWave the Licenses if the company fulfilled statutory eligibility requirements . . . . As in contract law more generally, a sale by auction is valid only upon offer and acceptance. *See generally Blossom* v. *Railroad Co.*¸ 70 U.S. (3 Wall) 196, 306 (1865); 7 Am. Jur. 2d Auctions and Auctioneering § 34 (1997); 7A C.J.S. (Auctions and Auctioneers) §§ 8, 12 (1980). As a baseline rule, the close of the auction — traditionally the drop of the hammer — signals acceptance of an offer and forms an enforceable contract. *See* 7 Am. Jur. 2d Auctions and Auctioneering § 34; 7A CJS Auctions and Auctioneers §§ 8, 12, (1980)."; Brief for the Federal Communications Commission, *FCC* v. *NextWave*, Nos. 01-653, 01-657, at 46 n.10 (U.S., filed May 2002) ("Under FCC licenses, performances are owed by both the licensee and the FCC. . . . Courts generally conclude that analogous exclusive licensing arrangements made by private parties for commercial reasons are 'executory.'"). *See, e.g., Select-A-Seat Corp.,* 625 F.2d 290, 292 (9th Cir. 1980) (software license executory where licensor was 'under a continuing obligation not to sell its software packages to other parties' and

conditions that were not subject to negotiation or variation.[64] An essential part of the bargain between the parties is that PCS licensees would be for a ten-year term renewable thereafter upon a demonstration of substantial service and *without* any additional buildout requirements.[65] The Commission set this "relatively long" license term and "high renewal expectancy" specifically to provide a "stable environment that is conducive to investment" in order to "foster the rapid development of PCS."[66] In other words, the FCC acknowledged that the license term and renewal expectancy were an essential term of the contract enveloping the licenses, because these were key factors on which bidders rely in valuing the license and investing in a PCS network based on such license.

A subsequent Commission decision that PCS carriers will lose some or all of their licenses during the renewal period if they do not satisfy new, additional buildout requirements or do not serve certain areas would constitute a major breach of the license contract. The auction winners invested substantial sums in licenses that were renewable without any additional

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the licensee was obligated to make payments); *James Cable Partners,* 27 F.3d 534, 537 (11th Cir. 1994) (cable franchise agreement).

[64] *See, e.g.,* FCC Auction, December 5, 1994, Broadband Personal Communications Services, Major Trading Area Licenses, Frequency Blocks A & B, Bidder's Information Package at 16 (1994) ("*A&B Block Bidder's Package*"), *available at* <http://wireless.fcc.gov/auctions/04/releases/4bip_1.pdf>. This package states: "The Terms contained in the Commission's Report and Orders, Public Notices and in the Bidder's Information Packages are not negotiable. Prospective bidders should *review these auction documents thoroughly prior to the auction to make certain that they understand all of the provisions and are willing to be bound by all of the Terms* before making any bid." *Id.* (emphasis added). While the *A&B Block Bidder's Package* expressly incorporated then-existing FCC rules, orders, and other documents into the contract between the FCC and the bidder, it is well established that "[e]xcept where a contrary intention is evident, the parties to a contract — including the Government, in a contract between the Government and a private party — are presumed to have contracted with reference to existing principles of law." 11 Richard Lord, Williston on Contracts § 30:19 (1999) (footnotes omitted). Thus, the FCC's license term, buildout requirements, and renewal rules would have been incorporated into the contract between the FCC and the auction winner even if the bidder's package had not referenced the orders adopting them. *See id.* ("the incorporation of applicable existing law into a contract does not require a deliberate expression by the parties.").

[65] *See* 47 C.F.R. §§ 24.15-16 (1994).

buildout requirement. "Under these circumstances, if the companies did not at least buy a promise that the Government would not deviate significantly from those procedures and standards, then what did they buy?"[67] Without the near-certainty of renewal without additional requirements, unquestionably bidders would have bid less and the winners would have invested their funds in facility deployment in a different manner.[68]

By retroactively changing the essential terms of the license, the Commission would be committing a major breach of its contractual duty to deliver a license that accords with the terms and conditions of the auction, including the license term and renewal provisions of the rules and orders incorporated therein.[69] Under these circumstances, the Commission would be subject to the same contractual remedies that would be applicable if a substantial breach occurred in a contract between private parties.[70] The Commission's failure to deliver a license consistent with the terms of the auction contract after the bidder has paid the requisite price would clearly constitute a breach justifying restitution or damages.[71] Moreover, the Commission's reneging on its promise to allow renewal without additional obligations may "so substantially impair[] the value of the contract" that it amounts to a "total breach," thereby allowing recovery of damages based on

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[66] *Second PCS Order*, 8 FCC Rcd 7700, 7753 (1993).

[67] *Mobil Oil Exploration. v. U.S.*, 530 U.S. 604, 620-21 (2000).

[68] The FCC's statement that these terms were intended to be "conducive to investment," 8 FCC Rcd at 7753, makes clear that the FCC understood these to be terms that bidders would rely upon in valuing licenses.

[69] *See A&B Block Bidder's Package* at 16

[70] "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996), *quoted in Mobil Oil*, 530 U.S. at 608.

[71] 7 Am. Jur. 2d Auctions and Auctioneers § 52 ("Once the vendee has complied with the terms of the sale, he or she is entitled to have the property delivered to him or her, and a refusal of delivery is a breach of contract.")

the remaining contractual rights to performance.[72] Accordingly, the Commission would become liable for restitution or damages if it were to alter the renewability provisions of the license contract arising from an auction.[73]

A significant change to the renewability of a license purchased at auction would also constitute a taking under the Fifth Amendment of the U.S. Constitution, which is unlawful unless the affected licensee receives just compensation. To the extent the Commission excludes certain portions of a licensee's service area upon renewal, under the "use-it-or-lose-it" approach followed in cellular, in order to auction off the "unserved" area to others, it would be engaging in a *per se* taking — the expropriation and occupation of a property interest to which the licensee is currently entitled. The Commission engages in a *per se* taking when it transfers the title, in the form of a license, to a service area from the current licensee to another, just as the government's "permanent physical occupation" of an area on the roof of an apartment building, by requiring the landlord to permit the installation of cable facilities, constituted a taking of the landlord's property.[74]

Even if the change in renewal terms did not constitute a *per se* taking, it would constitute a "regulatory taking." In *Penn Central*, the Supreme Court held that one of the factors of "particular significance" in determining whether a particular government act constitutes a regulatory taking is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[75] Thus, a regulatory act may not constitute a taking if "it did not interfere with interests that were suffi-

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[72] Restatement (Second) of Contracts § 243; *see Mobil Oil*, 530 U.S. at 608.

[73] *See Mobil Oil*, 530 U.S. at 614, *citing* Restatement (Second) of Contracts § 250, 243, 373 (1979).

[74] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 450 U.S. 419, 426 (1982).

[75] *Penn Central Transportation v. New York City*, 438 U.S. 104, 124 (1978).

ciently bound up with the expectations of the claimant."[76] The Commission *adopted* the current renewal policies for PCS licenses specifically to encourage investment.[77] Thus, there can be no doubt that any change to the renewal rights of PCS licensees would interfere with investment-backed expectations.

Moreover, the evaluation of whether a regulatory taking occurs must be "informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[78] To the extent the Commission imposes a new, additional build-out requirement at renewal time on licensees in order to expand coverage in "rural" areas that are more difficult or expensive to serve than previously built-out areas, it is forcing licensees with "rural" territory alone to bear the entire cost and burden of such coverage. Accordingly, imposing this obligation on carriers with rural service areas, upon pain of losing the "unserved" territory or being denied renewal, would constitute a regulatory taking requiring just compensation.[79]

II. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO ADD A "SUBSTANTIAL SERVICE" ALTERNATIVE FOR ALL WIRELESS SERVICES

Most commenters support the Commission's proposal to adopt a "substantial service" performance standard alternative for all wireless services that are licensed on a geographic basis, including PCS and MDS/ITFS licenses.[80] As CTIA observes, the addition of this option will,

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[76] *Id.* at 125.

[77] *PCS Second Order*, 8 FCC Rcd at 7753.

[78] *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001), *quoting Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

[79] In addition, Section 254 of the Communications Act indicates that Congress has determined that the cost of extending service to underserved rural areas should be borne more broadly.

[80] *See, e.g.*, Blooston Comments at 16; CTIA Comments at 4-6; Rural Cellular Association Comments at 8; Southern LINC Comments at 7-8; Wireless Communications Association Comments at 7-8.

among other things, provide firms interested in serving rural areas "a greater incentive and ability to raise necessary capital and to construct facilities and provide services that are situated to the needs of the rural area."[81]

Sprint supports this majority view for two reasons. First, the proposal would promote the regulatory parity directive of the Communications Act. Eleven years ago, Congress modified the Communications Act to ensure that "services that provide equivalent mobile services are regulated in the same manner," with Congress requiring the Commission "to review its rules and regulations to achieve regulatory parity among services that are substantially similar."[82] Congress specifically found that "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services."[83] As the Commission has recognized, it is "the purpose of the statute and the intent of the Commission to eliminate such disparities to the extent practical":

> The broad goal of this action is to ensure that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace.[84]

In this regard, appellate courts have vacated as arbitrary and capricious disparate buildout requirements imposed on different licensees that compete with each other.[85]

The Commission has acknowledged that it has adopted a substantial service construction benchmark for some but not all wireless services.[86] Adoption of a substantial service alternative

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[81] CTIA Comments at 5.

[82] H.R. REP. NO. 103-111, 103d Cong. 1st Sess., at 259 (1993).

[83] *Id.* at 260.

[84] *Third CMRS Report and Order*, 9 FCC Rcd 7988, 7994 ¶ 4, 8003 ¶ 24 (1993). To be sure, Congress gave the FCC "some degree of flexibility to determine which specific regulations should be applied to each carrier," but the FCC must find that "market conditions . . . justify differences in the regulatory treatment of some providers of commercial mobile services." H.R. CONF. REP. NO. 103-213, 103d Cong., 1st Sess., at 491 (1993). Sprint submits that market conditions do not warrant different buildout requirement for different licensees capable of providing the same services.

for all wireless services would enable the Commission to meet the regulatory parity directive that Congress has established for wireless services.

Second, Sprint submits that population or geographic based buildout requirements are no longer necessary. It is perhaps understandable that the Commission adopted rigorous buildout requirements for PCS licenses, and particularly the A and B bands. At the time, the wireless industry consisted largely of two cellular companies in each market (one of which was affiliated with an ILEC), the market was "less than fully competitive" as a result, and cellular incumbents were earning "economic rents of significant proportions."[87]

The market has undergone revolutionary change since new PCS licensees such as Sprint PCS have entered the market. According to Commission data, 83 percent of all Americans live in counties where they can select from five or more facilities-based wireless carriers and 71 percent of Americans can select from six or more wireless carriers.[88] Given that most Americans already have such a wide selection of service providers, it is simply unnecessary to adopt population or geographic based buildout requirements for any licensee, existing or new.

In fact, continued use of population or geographic based buildout requirements could undermine the public interest. The Commission recently established five Advanced Wireless Service ("AWS") licenses for each market, and it earlier established seven 700 MHz licenses for commercial mobile services for each market. It is unrealistic to think that a firm not already in the market will acquire these licenses to provide services that duplicate the services provided by existing licensees. Entering a market as the seventh, eighth or ninth competitor would be chal-

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[85] *See, e.g., Fresno Mobile Radio* v. *FCC,* 165 F.3d 965 (D.C. Cir. 1999).

[86] *See Rural Spectrum NPRM* at ¶ 32 and n.74.

[87] *First CMRS Competition Report,* 10 FCC Rcd 8844, 8845 ¶ 4, 8871 ¶ 81 (1995).

[88] *See Eighth CMRS Competition Report,* 18 FCC Rcd at 14793-94 ¶ 18 and 14823 ¶ 84.

lenging, and it will be difficult at best for such a firm to acquire the billions needed to finance an extensive new network. For firms not already in the market, it will be far more likely that they will acquire AWS and 700 MHz licenses to provide niche services. As the Commission has correctly recognized, the addition of a substantial service alternative will create more opportunities for licenses to focus on "previously untargeted niche or rural areas . . . rather than having to duplicate existing services and thereby tapping into an otherwise unserved market."[89]

One group of rural cellular incumbents takes a very different position.[90] These incumbents argue that the Commission should "abandon its 'substantial service' performance requirement and adopt stricter, more specific build-out obligations."[91] This position is illogical and anti-competitive. The rural cellular incumbents assert that adoption of stricter buildout requirement without a substantial service alternative will facilitate service in rural areas, because "entities willing to provide services to previously unserved portions of license areas will have adequate access to spectrum."[92] But, according to these same cellular incumbents, their rural areas are not large enough to support more than two wireless carriers (*i.e.,* themselves).[93] In other words, these cellular incumbents want the Commission to adopt buildout requirements that their potential competitors cannot meet, and they want the Commission to de-franchise their strongest potential competitors (*i.e.,* existing PCS licensees) from ever becoming actual competitors.

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[89] *Rural Spectrum NPRM* at ¶ 37.

[90] This cellular incumbent position is not shared by rural new entrant PCS licensees, which support a substantial service alternative. *See* Blooston Comments at 16.

[91] OPASTCO/RTG Joint Comments at 4.

[92] *Id.* at 5.

[93] *See id.* at 13.

III. IT IS PREMATURE TO CONSIDER USE OF A REGULATORY EASEMENT MODEL IN RURAL AREAS

The Commission, citing to its Spectrum Policy Task Force ("SPTF") Report, asks whether "now is the time to consider the use of spectrum easements for new licenses."[94] The SPTF recognized that a regulatory easement model may have some "potential" as a spectrum management tool but that this model also presents "significant challenges" and, as a result, "should be applied cautiously."[95] The SPTF therefore recommended that the Commission focus on the secondary markets model to facilitate additional access to spectrum and that it consider an easement model only after there has been an opportunity to evaluate the effectiveness of the secondary markets model.[96] As the Commission recognizes, there has been "little time to evaluate the effectiveness of the [new secondary markets] approach,"[97] so consideration of an easement model at this time is premature.[98]

Moreover, it is unclear whether an easement model would ever be appropriate for rural areas. The SPTF began examining such concepts as regulatory easements and interference temperatures as a means to facilitate access to spectrum. But spectrum is not congested in rural areas, and demand for spectrum in low density areas necessarily is considerably less than demand in suburban or urban areas. In this regard, the Commission has acknowledged that "access to spectrum does not appear to be a substantial barrier to entry in RSAs".[99] This view is confirmed

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[94] *Rural Spectrum NPRM* at ¶ 30.

[95] Spectrum Policy Task Force Report, ET Docket No. 02-135, at 56-58 (Nov. 15, 2002).

[96] *See id.* at 58.

[97] *Rural Spectrum NPRM* at ¶ 30.

[98] *See* CTIA Comments at 8; Dobson Comments at 9-10. Moreover, the easement model requires radios with specialized capabilities that do not now exist in the market. *See* SPTF Report at 59-60. *See also Cognitive Radio NPRM*, ET Docket No. 03-108, FCC 03-322 (Dec. 30, 2003).

[99] *2000 Biennial Review - Spectrum Cap Order*, 16 FCC Rcd 22668, 22691 ¶ 43 (2001).

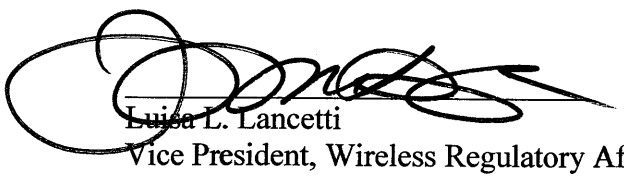
by a recent survey by the National Telecommunications Cooperative Association ("NTCA") of its members. Fifty-nine percent of survey respondents indicated they already hold at least one wireless license.[100] Of the 41 percent of respondents who do not currently hold licenses, only half stated they were even considering offering wireless service.[101] The survey results confirm that the principal challenge faced by rural carriers is not access to spectrum, but obtaining financing to make additional investments.[102]

IV. CONCLUSION

For the foregoing reasons, Sprint respectfully requests that the Commission take action consistent with the views expressed above.

Respectfully submitted,

SPRINT CORPORATION



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[100] *See* NTCA 2003 Wireless Survey Report, at 6 (Dec. 2003).

[101] *See id.* at 8. Some of these rural firms have already entered into negotiations to obtain spectrum. *See id.* at 9.

[102] *See id.* at 9-10.